FEDERAL COURT OF AUSTRALIA

Hart v Commissioner of Taxation [2019] FCAFC 179

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| Appeal from: | *Paule v Commissioner of Taxation* [2019] FCA 394 |
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| File numbers: | VID 345 of 2019  VID 346 of 2019  VID 347 of 2019  VID 348 of 2019  VID 350 of 2019 |
|  |  |
| Judges: | **KENNY, KERR AND MOSHINSKY JJ** |
|  |  |
| Date of judgment: | 18 October 2019 |
|  |  |
| Catchwords: | **TAXATION** – capital gains – discount capital gains – where trustees of various trusts sold shares and made capital gains – where various roll-overs had occurred prior to the sale of the shares – whether the appellants were entitled to a “discount capital gain” under Subdiv 115-A of the *Income Tax Assessment Act 1997* (Cth) in relation to the disposal of the shares by the trustees of the trusts – whether the relevant provisions operated such that the trustees were taken or deemed to have held the relevant assets for a period of at least 12 months |
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| Legislation: | *Acts Interpretation Act 1901* (Cth), s 15AA  *Income Tax Assessment Act 1997* (Cth), ss 102-5, 102-23, 103-25, 104-10, 109-5, 112-115, 112-150, 115-5, 115-10, 115-15, 115-20, 115-25, 115-30, 115-32, 115-34, 115-40, 115-45, 122-15, 124-780, 124-785, 124-865, 124-870, 124-875, 950-100, 995-1  *New Business Tax System (Integrity and Other Measures) Act 1999* (Cth), Sch 9  *Taxation Administration Act 1953* (Cth), Pt IVC  *Tax Laws Amendment (2010 Measures No. 1) Act 2010* (Cth), Sch 6 |
|  |  |
| Cases cited: | *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378  *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297  *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503  *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523  *Financial Synergy Holdings Pty Ltd v Federal Commissioner of Taxation* (2016) 243 FCR 250  *HFM043 v Republic of Nauru* (2018) 359 ALR 176  *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586  *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362  *Taylor v The Owners – Strata Plan 11564* (2014) 253 CLR 531  *Wentworth Securities Ltd v Jones* [1980] AC 74 |
|  |  |
| Date of hearing: | 16 August 2019 |
|  |  |
| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Taxation |
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| Category: | Catchwords |
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| Number of paragraphs: | 124 |
|  |  |
| Counsel for the Appellants: | Mr TP Murphy QC with Ms A Lee |
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| Solicitor for the Appellants: | Thomson Geer |
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| Counsel for the Respondent: | Mr EF Wheelahan QC with Mr L Molesworth |
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| Solicitor for the Respondent: | MinterEllison |

ORDERS

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|  | | VID 345 of 2019 |
|  | | |
| BETWEEN: | PHILIP HART  Appellant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| JUDGES: | KENNY, KERR AND MOSHINSKY JJ |
| DATE OF ORDER: | 18 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. By 4.00 pm on 25 October 2019, each party file a written submission (of no more than three pages) on the issue of costs. The issue of costs will then be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | | VID 346 of 2019 |
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| BETWEEN: | ANNA PAULE  Appellant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| JUDGES: | kenny, kerr AND moshinsky jj |
| DATE OF ORDER: | 18 OCTOBER 2019 |

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ORDERS

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|  | | VID 347 of 2019 |
|  | | |
| BETWEEN: | SPIRO PAULE  Appellant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| JUDGEs: | kenny, kerr and moshinsky jj |
| DATE OF ORDER: | 18 OCTOBER 2019 |

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ORDERS

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|  | | VID 348 of 2019 |
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| BETWEEN: | CORNELIA PAULE  Appellant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| JUDGEs: | kenny, kerr and moshinsky jj |
| DATE OF ORDER: | 18 OCTOBER 2019 |

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ORDERS

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|  | | VID 350 of 2019 |
|  | | |
| BETWEEN: | TERRY PAULE  Appellant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| --- | --- |
| JUDGEs: | kenny, kerr and moshinsky jj |
| DATE OF ORDER: | 18 OCTOBER 2019 |

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REASONS FOR JUDGMENT

THE COURT:

## Introduction

1 The issue raised by these appeals is whether the appellants are entitled to a “discount capital gain” under Subdiv 115-A of the *Income Tax Assessment Act 1997* (Cth) (the **ITAA 1997**) in relation to the disposal of certain assets by the trustees of certain trusts in the year ended 30 June 2008. One requirement that must generally be satisfied in order to be eligible for a “discount capital gain” is that the asset disposed of be held for at least 12 months: s 115-25(1) of the ITAA 1997. The question is whether, in the circumstances that occurred, the relevant provisions operated such that the trustees were taken or deemed to have held the relevant assets for a period of at least 12 months.

2 The respondent (the **Commissioner**) issued amended assessments to the appellants for the year ended 30 June 2008 on the basis that they were not entitled to discount capital gains in respect of the relevant transactions. The appellants objected to those assessments, and the Commissioner disallowed the objections. The appellants appealed to this Court pursuant to Pt IVC of the *Taxation Administration Act 1953* (Cth). The primary judge dismissed the applications with costs. The appellants appeal from the whole of the judgment of the primary judge.

3 For the reasons that follow, the primary judge’s construction of the relevant provisions, and his Honour’s application of those provisions to the facts of the present case, were correct. The appeals must therefore be dismissed.

## Procedural matters

4 There are five appeals before the Court. The appellants in the respective appeals are as follows: Philip Hart; Anna Paule; Spiro Paule; Cornelia Paule; and Terry Paule. We will refer to the last four appellants as the **Paules**.

5 The proceedings at first instance were conducted on the basis of an agreed statement of facts. There was no witness evidence, by affidavit or otherwise. One consequence of the way in which the material was prepared and presented at first instance is that there is little by way of factual context and explanation for the relevant transactions.

6 At first instance, the case was argued by reference to Anna Paule’s case; it was not contended below that any different result would flow by reason of the different facts of the other appellants’ cases. On appeal, however, submissions were made about the facts of the other cases. In light of those submissions, and for completeness, we will set out the background facts relating to all of the appellants, not just those relating to Anna Paule.

## The key legislative provisions

7 It is convenient to set out the key legislative provisions before turning to the background facts. Some of the relevant provisions were amended or inserted by the *Tax Laws Amendment (2010 Measures No. 1) Act 2010* (Cth) (the **2010 Amending Act**). The relevant amendments applied to assessments for income years including 21 September 1999 and later: 2010 Amending Act, Sch 6, item 146. That is, the amendments operated retrospectively and applied to the assessments the subject of these appeals. In setting out the key legislative provisions, we have used the compilation of the ITAA 1997 provided by the parties, which was prepared on 9 June 2010 and incorporates the amendments made by the 2010 Amending Act.

8 Subdivision 115-A of the ITAA 1997 is headed “Discount capital gains”. Although not in issue, we set out ss 115-5, 115-10, 115-15 and 115-20 to provide context for the issue in dispute. Those sections provide as follows:

**115‑5 What is a *discount capital gain*?**

A ***discount capital gain*** is a \*capital gain that meets the requirements of sections 115‑10, 115‑15, 115‑20 and 115‑25.

Note: Sections 115‑40, 115‑45 and 775‑70 identify capital gains that are *not* discount capital gains, despite this section.

**115-10 Who can make a discount capital gain?**

To be a \*discount capital gain, the \*capital gain must be made by:

(a) an individual; or

(b) a \*complying superannuation entity; or

(c) a trust; or

(d) a \*life insurance company in relation to a \*discount capital gain from a \*CGT event in respect of a \*CGT asset that is a \*complying superannuation/FHSA asset.

**115‑15 Discount capital gain must be made after 21 September 1999**

To be a \*discount capital gain, the \*capital gain must result from a \*CGT event happening after 11.45 am (by legal time in the Australian Capital Territory) on 21 September 1999.

**115‑20 Discount capital gain must not have indexed cost base**

(1) To be a \*discount capital gain, the \*capital gain must have been worked out:

(a) using a \*cost base that has been calculated without reference to indexation at any time; or

(b) for a capital gain that arose under \*CGT event K7—using the \*cost of the \*depreciating asset concerned.

Note: A listed investment company must also calculate capital gains without reference to indexation in order to allow its shareholders to access the concessions in Subdivision 115‑D.

(2) For the purposes of working out whether the \*capital gain is a \*discount capital gain and the amount of that gain, the \*cost base taken into account in working out the capital gain may be recalculated without reference to indexation if the cost base had an element including indexation because of another provision of this Act. This subsection has effect despite that other provision.

Note: This lets a capital gain of an entity (the ***gain entity***) on a CGT asset be a discount capital gain even if:

(a) another provision of this Act (such as a provision for a same‑asset roll‑over or Division 128) set the gain entity’s cost base for the asset by reference to the cost base for the asset when it was owned by another entity (the ***earlier owner***), and the earlier owner’s cost base for the asset included indexation; or

(b) another provision of this Act (such as a provision for a replacement‑asset roll‑over) set the cost base of the asset by reference to the cost base of the original asset involved in the roll‑over, and the original asset’s cost base included indexation.

Example: In 1995 Elizabeth acquired land from her ex‑husband under an order made by a court under the *Family Law Act 1975*. Former section 160ZZM of the *Income Tax Assessment Act 1936* treated her as having paid $56,000 for the land, equal to her ex‑husband’s *indexed* cost base for it. His cost base for the land then was $40,000.

In 2000, she sold the land for capital proceeds of $150,000.

Her discount capital gain on the land is $110,000 (equal to the capital proceeds less the cost base for the land without indexation).

(3) This section does not apply to a \*capital gain worked out under subsection 104‑255(3) (about carried interests).

9 The issue in the present case centres on ss 115-25, 115-30 and 115-34. Section 115-25 relevantly provides:

**115-25 Discount capital gain must be on asset acquired at least 12 months before**

(1) To be a \*discount capital gain, the \*capital gain must result from a \*CGT event happening to a \*CGT asset that was \*acquired by the entity making the capital gain at least 12 months before the CGT event.

Note 1: Even if the capital gain results from a CGT event happening at least a year after the CGT asset was acquired, the gain may not be a discount capital gain, depending on the cause of the CGT event (see section 115‑40) and the nature of the asset (see sections 115‑45 and 115‑50).

Note 2: Section 115‑30 or 115‑34 may affect the time when the entity is treated as having acquired the CGT asset.

This section, as note 2 to the section records, can be affected by s 115-30 or s 115-34. Notes and examples form part of the Act: ITAA 1997, s 950-100(1).

10 Section 115-30 relevantly provides:

**115-30 Special rules about time of acquisition**

*Entity is treated as acquiring some CGT assets early*

(1) Sections 115-25,115-40 and 115-45 (the ***affected sections***) apply as if an entity (the ***acquirer***) had acquired a \*CGT asset described in an item of the table at the time mentioned in the item:

|  |  |  |
| --- | --- | --- |
| **When the acquirer is treated as having acquired a CGT asset** | | |
| **Item** | **The affected sections apply as if the acquirer had acquired this CGT asset:** | **At this time:** |
| 1 | A \*CGT asset the acquirer \*acquired in circumstances giving rise to a \*same-asset roll-over | (a) when the entity that owned the CGT asset before the roll-over \*acquired it; or  (b) if the asset has been involved in an unbroken series of roll-overs — when the entity that owned it before the first roll-over in the series \*acquired it |
| 2 | A \*CGT asset that the acquirer \*acquired as a replacement asset for a \*replacement-asset roll-over (other than a roll-over covered by paragraph 115-34(1)(c)) | (a) when the acquirer acquired the original asset involved in the roll-over; or  (b) if the acquirer acquired the replacement asset for a roll-over that was the last in an unbroken series of replacement-asset roll-overs (other than roll‑overs covered by paragraph 115‑34(1)(c)) — when the acquirer acquired the original asset involved in the first roll-over in the series |
| … |  |  |

(Underlining added.)

11 Consistently with the approach of the primary judge, we will refer in these reasons to the table to s 115-30(1) as having an “item column” and then two columns of substance:

(a) the “first column” identifies the relevant CGT asset;

(b) the “second column” identifies the time at which the acquirer is treated as having acquired the CGT asset.

12 Section 115-30 refers to both a “replacement-asset roll-over” and a “same-asset roll-over”. A “replacement-asset roll-over” is defined in s 995-1(1) as follows:

***replacement‑asset roll‑over***: a ***replacement‑asset roll‑over*** allows you to defer the making of a \*capital gain or a \*capital loss from one \*CGT event until a later CGT event happens where your ownership of one CGT asset ends and you \*acquire another one. The ***replacement‑asset roll‑overs*** are listed in section 112‑115.

13 A “same-asset roll-over” is defined in s 995-1(1) as follows:

***same‑asset roll‑over***: a ***same-asset roll‑over*** allows you to disregard a \*capital gain or \*capital loss you make from:

(a) \*disposing of a \*CGT asset to another entity; or

(b) entering into an agreement with another entity that constitutes CGT event B1; or

(c) creating a CGT asset in another entity.

The ***same‑asset roll‑overs*** are listed in section 112‑150.

14 Section 115-34 provides:

**115-34 Further special rule about time of acquisition for certain replacement‑asset roll‑overs**

(1) This section applies if:

(a) a \*CGT event happens to your \*share in a company; and

(b) at the time of the CGT event, you had owned the share for less than 12 months; and

(c) you \*acquired the share as a replacement asset for:

(i) a \*replacement‑asset roll‑over under Subdivision 122‑A (disposal of assets by individuals or trustees to a wholly‑owned company) for which you \*disposed of a \*CGT asset, or all the assets of a \*business, to the company; or

(ii) a replacement‑asset roll‑over under Subdivision 122‑B (disposal of assets by partners to a wholly‑owned company) for which you disposed of your interests in a CGT asset, or your interests in all the assets of a business, to the company; or

(iii) a replacement‑asset roll‑over under Subdivision 124‑N (disposal of assets by trusts to a company) for which a trust of which you were a beneficiary disposed of all of its CGT assets to the company.

*Application of tests about when you acquired the share*

(2) Sections 115‑25 and 115‑40 apply as if you had \*acquired the \*share at least 12 months before the \*CGT event.

*Application of tests about the company’s assets*

(3) For each asset mentioned in subparagraph (1)(c)(i), subsections 115‑45(4) and (6) apply as if the company had \*acquired that asset when you acquired it.

(4) For each asset mentioned in subparagraph (1)(c)(ii), subsections 115‑45(4) and (6) apply as if the company had \*acquired that asset when you acquired your interests in it.

(5) For each asset mentioned in subparagraph (1)(c)(iii), subsections 115‑45(4) and (6) apply as if the company had \*acquired that asset when the trust acquired it.

*Relationship with Subdivision 109‑A*

(6) This section has effect despite Subdivision 109‑A (which contains rules about the time of acquisition of CGT assets).

## Background facts

15 The following summary of the background facts is substantially based on the reasons of the primary judge (the **Reasons**), including Annexure A to the Reasons. The primary judge’s factual findings reflect the facts set out in the agreed statement of facts. Consistently with the approach of the primary judge, when we refer to actions of a trust, this is a shorthand reference for actions of the trustee of that trust.

### S&TP Trust

16 Each of the Paules was a beneficiary of the S&TP Family Trust (the **S&TP Trust**). Each of the Paules was entitled to 25% of the trust’s income for the year ended 30 June 2008.

17 As at 14 January 2008, the S&TP Trust held all of the issued units in The Lifeplan Insurance Agencies Unit Trust (**Lifeplan Unit Trust**). It had held those units for a period of more than 12 months.

18 On 14 January 2008:

(a) the Lifeplan Unit Trust disposed of all of its assets to STP Holdings Pty Ltd (**STP Holdings**) (this involved a “same-asset roll-over”); and

(b) the S&TP Trust’s ownership of the units in the Lifeplan Unit Trust ended and was replaced by shares in STP Holdings (this involved a “replacement-asset roll-over”).

19 The S&TP Trust chose to obtain a roll-over under Subdiv 124-N of the ITAA 1997 in respect of the disposal of each of its units in the Lifeplan Unit Trust: see ITAA 1997, s 124-870.

20 On or around 15 January 2008, the S&TP Trust exchanged all of its shares in STP Holdings for newly issued shares in E-Quest Holdings Pty Ltd (**E-Quest**). The trust chose to obtain a scrip for scrip roll-over under Subdiv 124-M: see ITAA 1997, s 124-780.

21 On 15 January 2008, the trust exchanged all of its shares in E-Quest for shares in Findex Australia Pty Ltd (**Findex**). It chose to obtain a scrip for scrip roll-over under Subdiv 124-M.

22 On 18 January 2008, the trust sold its Findex shares to Macquarie Financial Services Holdings Pty Ltd (**Macquarie**) for $5,256,432, realising a capital gain of $5,256,432.

23 On 29 June 2008, the trustee of the S&TP Trust resolved to distribute 25% of its income (including the capital gain) for the relevant period to each of the Paules.

24 As can be seen, the sequence of the roll-overs in respect of the S&TP Trust was:

(a) Subdivision 124-N;

(b) Subdivision 124-M; and

(c) Subdivision 124-M.

### STP Trust

25 Terry Paule was a beneficiary of the STP Family Trust (the **STP Trust**).

26 As at 15 January 2008, the STP Trust held 40% of the issued units in the E-Quest Unit Trust. It had held those units for a period of more than 12 months.

27 On 15 January 2008:

(a) the E-Quest Unit Trust disposed of all of its assets to E-Quest; and

(b) the STP Trust’s ownership of the units in the E-Quest Unit Trust ended and were replaced by shares in E-Quest.

28 The STP Trust chose to obtain a roll-over under Subdiv 124-N of the ITAA 1997 in respect of the disposal of each of its units in the E-Quest Unit Trust.

29 On 15 January 2008, the STP Trust exchanged all of its shares in E-Quest for shares in Findex and chose to obtain a scrip for scrip roll-over under Subdiv 124-M.

30 On 18 January 2008, the STP Trust sold 800,000 shares in Findex to Macquarie for $1 a share, realising a capital gain.

31 On 29 June 2008, the trustee of the STP trust resolved to distribute to Terry Paule 100% of its income (including the capital gain) for the relevant period.

32 As can be seen, the sequence of the roll-overs in respect of the STP Trust was:

(a) Subdivision 124-N; and

(b) Subdivision 124-M.

### SP Trust

33 Spiro Paule was a beneficiary of the SP Family Trust (the **SP Trust**).

34 The SP Trust held units in the E-Quest Unit Trust, which it had held for more than 12 months.

35 On 15 January 2008:

(a) the E-Quest Unit Trust disposed of all of its assets to E-Quest; and

(b) the SP Trust’s ownership of the units in the E-Quest Unit Trust ended and were replaced by shares in E-Quest.

36 The SP Trust chose to obtain a roll-over under Subdiv 124-N in respect of the disposal of each of its units in the E-Quest Unit Trust.

37 On 15 January 2008, the SP Trust acquired shares in Findex in exchange for its E-Quest shares and chose to obtain a scrip for scrip roll-over under Subdiv 124-M.

38 On 18 January 2008, it sold 800,000 of the Findex shares for $1 a share, realising a capital gain.

39 On 29 June 2008, the trustee of the SP Trust resolved to distribute to Spiro Paule 100% of its income (including the capital gain) for the relevant period.

40 As can be seen, the sequence of the roll-overs in respect of the SP Trust was:

(a) Subdivision 124-N; and

(b) Subdivision 124-M.

### Grosvenor Trust

41 Mr Hart was a beneficiary of the Grosvenor Trust.

42 On 14 January 2008, the Grosvenor Trust disposed of all of its assets to P Hart Holdings Pty Ltd in exchange for 100% of its shares. The Grosvenor Trust chose to obtain a roll-over under Subdiv 122-A in respect of the disposal of assets: see ITAA 1997, s 122-15.

43 There is no finding in the Reasons regarding the period of time that the Grosvenor Trust had held the assets that it disposed of to P Hart Holdings Pty Ltd on 14 January 2008. That matter was not covered in the agreed statement of facts. At the hearing of the appeal, in response to the matter having been raised by the appellants, the Commissioner through his senior counsel accepted that the assets that the Grosvenor Trust disposed of to P Hart Holdings Pty Ltd on 14 January 2008 had been acquired by the Grosvenor Trust at least 12 months earlier (T37).

44 On or around 15 January 2008, the Grosvenor Trust exchanged its shares in P Hart Holdings for newly issued shares in E-Quest. It chose to obtain a scrip for scrip roll over under Subdiv 124-M for the disposal of each of its shares.

45 On 15 January 2008, the Grosvenor Trust exchanged all its shares in E-Quest for newly issued Findex shares. It chose to obtain a scrip for scrip roll-over under Subdiv 124-M in respect of the disposal of each of its shares.

46 On 18 January 2008, the Grosvenor Trust sold its shares in Findex to Macquarie, realising a capital gain of $2,269,134.

47 On 17 June 2008, the trustee of the Grosvenor Trust resolved to distribute to Susan Hart $25,000 of the income and distribute the balance to Mr Hart.

48 As can be seen, the sequence of the roll-overs in respect of the Grosvenor Trust was:

(a) Subdivision 122-A;

(b) Subdivision 124-M; and

(c) Subdivision 124-M.

### General

49 At the hearing of the appeal, in response to questions from the Court as to the purpose of the transactions, senior counsel for the appellants said that: so far as it could be deduced from the agreed facts and the nature of the roll-overs, the purpose was ultimately to sell various shares and units in trusts to Macquarie; the various roll-overs were undertaken to ensure that the various companies running various businesses were able to be owned by Findex; and the last of the roll-overs was essentially an aggregation to enable Findex to own the various companies and trust assets, to enable transfer to Macquarie by way of a transfer of shares in Findex (T5; see also T6).

### Audit, assessment and objection

50 On 17 October 2014, each of the Paules made a voluntary disclosure to the Commissioner of the distribution of capital gains realised by the S&TP Trust, the STP Trust and the SP Trust on the disposal of Findex shares.

51 On 27 May 2016, following an audit of Terry and Spiro Paule’s tax affairs and associated entities, the Commissioner issued notices of amended assessment for the year ended 30 June 2008 to each of the Paules. The notices of amended assessment increased:

(a) Terry Paule’s taxable income from $64,478 to $2,508,691;

(b) Anna Paule’s taxable income from $43,484 to $1,504,069;

(c) Cornelia Paule’s taxable income from $37,408 to $1,466,040; and

(d) Spiro Paule’s taxable income from $99,287 to $2,379,643.

52 On 15 June 2016, each of the Paules lodged objections against the amended assessments.

53 On 24 April 2018, the Commissioner disallowed the objections in full.

54 On 30 August 2017, following an audit of Mr Hart’s tax affairs and associated entities, the Commissioner issued a notice of amended assessment to Mr Hart, increasing his taxable income from $353,031 to $2,612,252.

55 On 20 October 2017, Mr Hart lodged an objection against the amended assessment.

56 On 20 June 2018, the Commissioner disallowed the objection in full.

## The Reasons of the primary judge

57 Consistently with the way the case had been argued, and for simplicity, the Reasons addressed the issues by reference to Anna Paule’s case.

58 The primary judge concluded that the gain on disposal of the Findex shares was not a “discount capital gain”. In the primary judge’s view, neither s 115-30 nor s 115-34 operated, independently or together, to deem the Findex shares to have been held by the S&TP Trust for at least 12 months. The primary judge made observations, at [6]-[7], that in some ways this was an unpalatable result, and that it seemed to be at odds with the underlying policy of the legislation. His Honour stated at [6]: “At least in broad terms, the underlying policy which the statute reveals is to allow discount capital gains where, as a matter of economic substance rather than legal form, the assets disposed of have been held by a taxpayer for at least 12 months. That is what occurred here.” His Honour stated at [7]:

It was only the fact that one of the roll-overs in each series of roll-overs was of a particular type (one covered by s 115-34(1)(c)) that the provisions did not operate to allow a discount capital gain. If the series of roll-overs had not included a roll-over covered by s 115-34(1)(c) the gain would have been a discount capital gain. For example, if the S&TP Trust did not have units in a unit trust operating the business, but had shares in a company which operated the business, it could have carried out three Subdiv 124-M scrip-for-scrip roll-overs and the gain on disposal of the Findex shares would have been a discount capital gain consistent with the broad policy revealed by the statutory scheme. It is difficult to see the policy reason for excluding the present taxpayers, or taxpayers in an equivalent position, from the benefit of a discount capital gain simply because one of the roll-overs in the series was one to which s 115-34(1)(c) applied; none was clearly articulated. However, it is not for this Court to second guess the legislature or the Commissioner’s administration of the tax laws.

59 After setting out the background facts, the Reasons were structured as follows:

(a) first, what the primary judge concluded was the correct construction of the provisions;

(b) secondly, why the appellants’ construction could not be accepted; and

(c) thirdly, why the appellants’ alternative argument – that the Court should read into s 115-34(2) a reference to s 115-30 – was rejected.

### First matter: The correct construction

60 The primary judge noted, at [21], in relation to Anna Paule’s case and the application of s 115-25(1) to it, that the “CGT event” that happened to the “CGT asset” was the disposal on 18 January 2008 by the S&TP Trust of its shares in Findex. Those shares were in fact acquired three days earlier and so had not been acquired “at least 12 months before the CGT event”. The primary judge noted, at [22], that the appellants contended that the effect of ss 115-30 and 115-34 was that those shares were taken or deemed to have been acquired earlier than they were such that s 115-25(1) was satisfied.

61 The primary judge noted, at [26], that the roll-overs referred to in s 115-34(1)(c) involve, or can involve, both replacement-asset roll-overs and same-asset roll-overs: see s 112-115 (items 1, 2 and 14B) and s 112-150 (items 3, 4 and 4A in the table). The primary judge noted, at [30], that a scrip for scrip roll-over under Subdiv 124-M only involves a “replacement-asset roll-over” as defined: see item 14A in the table to s 112-115.

62 The primary judge’s core reasoning on the correct construction was as follows:

31 Section 115-34 operates in relation to the disposal of a share in a company by deeming the share to have been acquired at least 12 months before the CGT event for the purposes of the application of s 115-25 and s 115-40 if the share had been acquired as a replacement asset for a replacement-asset roll-over included in subs 115-34(1)(c), namely a replacement-asset roll-over under Subdivs 122-A, 122-B or 124-N.

32 Section 115-34 did not operate with respect to the replacement-asset roll-over pursuant to which the S&TP Trust acquired the Findex shares, because they were acquired in a Subdiv 124-M replacement-asset roll-over which was not a roll-over of a kind covered by s 115-34(1)(c).

33 As mentioned, the sequence of roll-overs relevant to Mrs Anna Paule were: Subdivs 124-N, 124-M and 124-M. The first roll-over was one to which s 115-34(1)(c) applied. It was common ground that this roll-over was a “replacement-asset roll-over under Subdivision 124-N” within the meaning of s 115-34(1)(c)(iii).

34 The shares in Findex were “acquired as a replacement-asset for a replacement-asset roll-over (other than a roll-over covered by paragraph 115-34(1)(c))”. That is, the shares in Findex met the description in item 2, column 1 of the table in s 115-30(1). Accordingly, s 115-25 applied “as if the acquirer had acquired” the shares in Findex at the time identified in item 2, column 2 in the table to s 115-30(1). Item 2, column 2 contains two possibilities, (a) or (b), as to the time at which the asset was treated as having been acquired:

(1) As to (a): the “original asset” in the roll-over was the shares in E-Quest which had been acquired on 15 January 2008.

(2) As to (b): the Findex shares were acquired in “an unbroken series of replacement-asset roll-overs”, but this “unbroken series” cannot include roll-overs covered by paragraph 115-34(1)(c). The first roll-over was one “covered by” s 115-34(1)(c). Accordingly, at best, the “unbroken series” comprised the two Subdiv 124-M roll-overs which both occurred on 15 January 2008.

63 The primary judge concluded, at [35], that s 115-25(1) was not satisfied. In summary, in his Honour’s view:

(a) section 115-30(1) did not operate to deem the Findex shares to be acquired any earlier than 15 January 2008; and

(b) section 115-34(2) did not operate to deem the Findex shares to have been acquired at least 12 months earlier than the date of disposal.

### Second matter: The appellants’ construction

64 The primary judge then considered two arguments advanced by Anna Paule in support of a different construction. These were:

(a) first, that the provisions had a “sequential” or “combined” operation; and

(b) secondly, that – to the extent there were two or more possible constructions of the provisions – her construction was to be preferred having regard to the legislative history and intended effect of the amendments made by the 2010 Amending Act.

65 The primary judge rejected these arguments, for reasons given at [38]-[71].

66 In relation to the contention that the provisions had a sequential operation, his Honour set out the steps in the appellants’ argument at [39]. These steps focussed on the S&TP Trust’s disposal of the shares in STP Holdings. His Honour said at [40]:

Each of those matters is to be accepted. However, that is relevant for the purposes of working out whether the capital gain on the disposal of the STP Holdings shares was a discount capital gain. Whether or not it was a discount capital gain did not in fact need to be determined because the S&TP Trust claimed roll-over relief such that any capital gain was disregarded. That particular disposal, however, is not of direct concern. The relevant disposal for present purposes is the final disposal, namely the disposal of the Findex shares.

67 In relation to the contention that the relevant provisions (ss 115-30 and 115-34) had a combined operation, his Honour concluded at [46]-[47]:

46 There is nothing in the language of s 115-25 which supports the interpretation that s 115-34(1)(c) can apply to, or with, s 115-30. Note 2 to s 115-25 contemplates that s 115-30 or s 115-34 may affect the time when the entity is treated as having acquired the asset, not both.

47 Section 115-34 deemed the shares in STP Holdings (acquired by the S&TP Trust under the Subdiv 124-N roll-over) to have been acquired at least 12 months before the acquisition of the E-Quest shares for the purposes of s 115-25 and s 115-40. This deeming did not operate for the purposes of s 115-30(1) because s 115-34(2) did not provide for that. The deeming only operated for the purposes of s 115-25 and was relevant to determining the particular consequences of the particular disposal.

68 His Honour considered the appellants’ argument based on the legislative history and intended effect of the amendments made by the 2010 Amending Act (the **2010 Amendments**) in some detail, referring to the explanatory memorandum to the Tax Laws Amendment (2010 Measures No. 1) Bill 2010 (Cth) (the **Explanatory Memorandum**) and the legislative provisions as they stood before the amendments. His Honour concluded at [71]:

The express terms of the provisions following the 2010 Amendments are clear. The 2010 Amendments have been carefully drafted to treat the specific roll-overs mentioned in s 115-34(1)(c) differently to those dealt with in s 115-30 and to carve out from the field of operation of item 2 of s 115-30(1) roll-overs which are covered by s 115-34(1)(c). It may be that the 2010 Amendments caused unintended negative consequences in relation to particular taxpayers arising out of the facts of their particular cases. That is, it may be that the drafter of the Explanatory Memorandum was wrong and that, in fact, there were negative consequences to particular taxpayers. That does not allow the Court to give the terms of the statute a meaning which they cannot bear, particularly when it is plain that the legislature intended the operation of s 115-45 to differ as between replacement-asset roll-overs to which s 115-34(1)(c) applied and those to which it did not. If the provisions were to be read in a way which their language does not support, that is likely to have other unintended consequences.

### Third matter: The Cooper Brookes submission

69 The primary judge then considered the appellants’ alternative case. The appellants contended that, if their construction arguments failed, the Court should “read into” s 115-34(2) a reference to s 115-30. The appellants submitted that:

(a) the precise purpose of the provision could be identified;

(b) there had been an inadvertent failure to deal with an eventuality that must be dealt with if the provision is to achieve its purpose;

(c) the words that Parliament would have included can be clearly identified; and

(d) the additional words that might be read into the text are consistent with the wording otherwise adopted.

In this regard, the appellants referred to *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 (***Cooper Brookes***) and *Taylor v The Owners – Strata Plan 11564* (2014) 253 CLR 531 (***Taylor***) at [22]-[25] and [39]. The first three matters identified above were intended to reflect the three conditions identified by Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74 as those required to be satisfied before reading additional words into a statute. The fourth was intended to reflect a fourth condition, identified by McColl JA in the Court of Appeal decision the subject of the appeal in *Taylor*.

70 The primary judge rejected this contention, for reasons given at [74]-[78]. His Honour referred to *Taylor* at [22]-[23], [25], [38], [39] and [65], and *HFM043 v Republic of Nauru* (2018) 359 ALR 176 (***HFM043***) at [24]. The primary judge concluded at [78]:

Underlying the applicants’ case in this regard is the proposition that the legislature should be taken to have intended to provide for the capital gains discount to be available in circumstances such as the present. That proposition is not made out from a consideration of the legislative history or the Explanatory Memorandum. Accordingly, the contention that the Court should read a reference to s 115-30 into s 115-34(2) must be rejected.

71 Accordingly, the primary judge dismissed each of the proceedings.

## The appeal

72 The appellants appeal from the judgment of the primary judge. The appellants’ notices of appeal are in substantially the same form in each appeal. For example, Anne Paule’s notice of appeal (in proceeding No. VID 346 of 2019) contains the following grounds:

1. The primary judge misconstrued ss 115-25, 115-30 and 115-34 of the *Income Tax Assessment Act 1997* (Cth) by finding that the 50% GST discount did not apply to the disposal by the S&TP Trust of its shares in Findex Australia Pty Limited because s 115-30(1) did not deem the Findex shares to be acquired any earlier than 15 January 2018 [sic] and s 115-34(2) did not operate to deem the Findex shares to have been acquired at least 12 months earlier than the date of disposal.

2. His Honour should have found that s 115-34(2) deemed the S&TP Trust to have acquired the shares in STP Holdings Pty Limited at least 12 months earlier than their date of disposal (15 January 2008) and that Item 2 of the Table in s 115-30(1) deemed the Findex shares to have been acquired more than 12 months before 15 January 2008.

3. Further or alternatively his Honour should have construed s 115-34(2) as though it included a reference to “, 115-30” immediately after “115-25”, particularly having regard to the retrospective nature of the amendments introduced by *Tax Laws Amendment (2010 Measures No 1) Act 2010* (Cth) and the expressed Parliamentary intention that those amendments should not disadvantage taxpayers.

## The appellants’ submissions

73 The appellants submit that these appeals essentially concern the proper construction of ss 115-25, 115-30 (item 2 of the table), 115-34 and 115-45 in their statutory context as part of the capital gains regime contained in Parts 3-1 and 3-3 of the ITAA 1997, in particular, s 102-5, s 102-23, s 104-10 (CGT event A1) and the roll-over provisions contained in Subdivisions 122-A, 124-M and 124-N; see generally *Financial Synergy Holdings Pty Ltd v Federal Commissioner of Taxation* (2016) 243 FCR 250 at [11]-[23]. In relation to statutory construction, the appellants refer to *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at [47], [53]-[55] and *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 (***SZTAL***) at [14].

74 The appellants note that the provisions form part of the discount capital gains provisions, which were first introduced by the *New Business Tax System (Integrity and Other Measures) Act 1999* (Cth), Sch 9, and amended with retrospective effect by the 2010 Amending Act; the effect of the provisions is to reduce the capital gains made by certain taxpayers by adding a further step, step 3, to the calculation of the net capital gain in s 102-5. The appellants agree with the primary judge’s examination of the legislative history and statement of the applicable principles of statutory construction.

75 The appellants make the following submissions concerning the relevant provisions as they stood in January 2008 (i.e. prior to their amendment in 2010):

(a) While Subdiv 122-A and Subdiv 124-N, unlike Subdiv 124-M, provided for the shares to be acquired before 20 September 1985 if the assets disposed of to the company were acquired before that date, none of them provided for a date of acquisition of the shares other than the date they were actually acquired (s 109-5(2)).

(b) Consequently, while these provisions preserved the pre-20 September 1985 status of CGT assets, they provided no mechanism for the application of the discount capital gains provisions when Div 115 was legislated.

(c) Instead, item 2 in the table to s 115-30(1) (which, before its amendment in 2010, applied to ss 115-25, 115-40 and 115-45) treated a CGT asset that the acquirer acquired as a replacement asset for a replacement-asset roll-over to have been acquired:

(i) when the acquirer acquired the original asset involved in the roll-over; or

(ii) if the acquirer acquired the replacement asset for a roll-over that was the last in an unbroken series of replacement-asset roll-overs – when the acquirer acquired the original asset involved in the first roll-over in the series.

76 The appellants make the following submissions based on the relevant provisions as they stood in January 2008 (i.e. before the amendments in 2010):

(a) The roll-overs that happened in January 2008 were, as item 2 in the table to s 115-30(1) then provided, an unbroken series of replacement-asset roll-overs; the roll-overs were carried out in an orderly manner over two days and the replacement asset in each roll-over became the original asset in the next roll-over. Consequently, the S&TP Trust would have been deemed to have acquired its shares in Findex at the same time it acquired its units in the Lifeplan Unit Trust under paragraph (b) of item 2 as it then was (i.e. more than 12 months earlier).

(b) The special rules in s 115-30 were also relevant to the application of s 115-45, which dealt with capital gains arising from CGT events happening to equity interests in companies or trusts that had newly acquired assets. The purpose of this section was to look through the interposed company to determine the date of acquisition of the equity interest (which might in fact have been more than 12 months earlier) by reference to the cost bases and net capital gains of CGT assets acquired by the company within 12 months. If they were more than 50% of the cost base or net capital gain attributable to all CGT assets, the shares were to be treated as having been acquired within 12 months.

(c) A company might have acquired assets within 12 months under a roll-over of assets acquired more than 12 months previously by the transferor. In that case, the intended effect of items 1 and 2 in the table to s 115-30(1) was that the company would be treated as having acquired these assets when the transferor acquired them.

(d) However, in the context of s 115-45, item 2 had a fundamental flaw – the identity of the acquirer. For the purposes of s 115-45 the acquirer (of the CGT assets disposed of to the company) is the interposed company. However, item 2 to the table only applies to the asset that the acquirer acquired as a replacement asset. The company did not acquire the CGT asset as a replacement asset. The replacement asset for that roll-over was the share acquired by the taxpayer.

(e) Here, for example, the S&TP Trust acquired its shares in Findex under a Subdiv 124-M replacement-asset roll-over on 15 January 2008. Findex acquired its shares in E-Quest on or before that date under a Subdiv 124-M replacement-asset roll-over from the S&TP Trust. However, they were not themselves replacement assets. Accordingly, item 2 did not apply and, for the purposes of s 115-45, Findex may be treated as having acquired its shares in E-Quest when the S&TP Trust acquired its shares in Findex.

77 The appellants refer to and rely on the Explanatory Memorandum at pp 209-211 (explaining the amendments made in 2010). The Explanatory Memorandum states that the amendments “give effect to a suggestion made through TIES 0042-2009”. “TIES” refers to the Tax Issues Entry System. The appellants refer to and rely on a TIES document relating to issue number 0042-2009 (the **TIES document**), which appears to be the document referred to in the Explanatory Memorandum. During the appeal hearing, we were informed by senior counsel for the Commissioner that a copy of the document had been provided by the appellants’ representatives to the Commissioner’s representatives in the lead up to the appeal hearing, and that the Commissioner’s representatives had been unable to confirm whether the document was, in fact, the relevant entry as part of the TIES (T55). In any event, a copy of the document was provided to the Court by senior counsel for the Commissioner, and no objection was taken to the Court considering it.

78 The appellants submit that the legislation was amended by the 2010 Amending Act (with retrospective effect to the date of introduction of Subdiv 115-A) to rectify the anomaly referred to above by:

(a) in the case of replacement-asset roll-overs that are also same-asset roll-overs (i.e. those covered by Subdivisions 122-A, 122-B and 124-N) by:

(i) adding a new section, s 115-34; and

(ii) excluding them from item 2 of the table to s 115-30(1) as a roll-over “covered by paragraph 115-34(1)(c)” and, where there had been an unbroken series of replacement-asset roll-overs, excluding them from that unbroken series also as roll-overs “covered by paragraph 115-34(1)(c)”; and

(b) in the case of replacement-asset roll-overs that are not same-asset roll-overs (e.g. Subdiv 124-M roll-overs), by adding a new section, s 115-32, which is confined to s 115-45 and, in particular, the tests under s 115-45(4) and (6).

79 The appellants make the following submissions concerning the application of the discount capital gain provisions, as amended, to the present case:

(a) Here, the relevant CGT assets are the shares in Findex. They were acquired under a Subdiv 124-M roll-over for the shares in E-Quest which, in turn, were acquired under a Subdiv 124-M roll-over for the shares in STP Holdings. These two roll-overs constitute an “unbroken series of replacement-asset roll-overs (other than roll-overs covered by paragraph 115-34(1)(c))” of which the first was the roll-over of the shares in STP Holdings.

(b) The issue is then: when were the shares in STP Holdings acquired? They were acquired as a result of the Subdiv 124-N roll-over of the assets of the Lifeplan Unit Trust. That roll-over was not part of the unbroken series of replacement-asset roll-overs. However, a CGT event *did* happen to those assets and Subdiv 124-N was capable of applying, and did apply, to that CGT event. That roll-over falls within the ambit of s 115-34. Consequently, the shares in STP Holdings were acquired when the Lifeplan Unit Trust acquired its assets, which was 12 months before the roll-over.

(c) The primary judge erred in rejecting the relevance of the appellants’ submission that the provisions have a sequential operation. In particular, his Honour erred in stating, at [40] of the Reasons, that “[w]hether or not it was a discount capital gain did not in fact need to be determined because the S&TP Trust claimed roll-over relief such that any capital gain was disregarded ... The relevant disposal for present purposes is ... the disposal of the Findex shares”.

(d) The issue is not whether the capital gains made on disposal of the shares in STP Holdings or E-Quest are to be disregarded; it is whether the shares are to be taken to have been acquired at least 12 months earlier. Disregarding a capital gain assumes that something (here, CGT event A1) happened to CGT assets (the shares in E-Quest and STP Holdings), and does not treat the CGT events as not having happened, nor alter the characteristics of the CGT assets such as the dates they are taken to have been acquired.

(e) Section 102-23 makes it clear that a CGT event still happens even if the capital gain is disregarded. That CGT event gives rise to the capital gain to which Subdiv 115-A is to be applied to determine if it is a discount capital gain to be included under step 3 in the calculation of the net capital gain.

(f) These roll-overs did not happen automatically. Rather, in the case of the Subdiv 124-N roll-over, both the transferor and transferee had to choose the roll-over (s 124-865), and in the case of the Subdiv 124-M roll-overs, the original interest holder (and in some cases the acquirer) had to choose the roll-over. In each case, that choice had to be made by the date of lodgement of the income tax return for the income year in which the CGT event happened (or in such further time as is allowed by the Commissioner (s 103-25)). Consequently, at the end of the income year, the taxpayer would be treated as having made a capital gain, and it would only be because the requisite choices were subsequently made that that capital gain would be disregarded (ss 122-15, 124-785(1), and 124-875(1)).

80 Alternatively, the appellants submit that s 115-30 ought to be applied in accordance with a sequential approach. Under that approach, the section is to be applied to each roll-over individually in accordance with paragraph (a) of item 2.

81 In the further alternative, the appellants submit that: a reference to s 115-30 should be read into s 115-34(2) in accordance with the principles set out in *Cooper Brookes* and *Taylor*; the legislative intention is to allow a discount capital gain in circumstances such as the present case; this is clear from the flaw in s 115-45 (which the amendments address), the legislative history and the fact that the amendments operate retrospectively to the commencement of Subdiv 115-A.

82 As noted above, at first instance the case was argued by reference to Anna Paule’s case. The appellants’ submissions on appeal were largely directed to the case of Anna Paule. However, it was also noted that in two cases – the case of Terry Paule and the STP Trust and the case of Spiro Paule and the SP Trust – once the roll-over under Subdiv 124-N is excluded (pursuant to item 2 in the table to s 115-30(1)), there was only one roll-over (T33-34; T66-67). In these circumstances, it was submitted, there was not “an unbroken series of replacement-asset roll-overs (other than roll-overs covered by paragraph 115-34(1)(c)” as referred to in paragraph (b) of item 2 in the table to s 115-30(1); the situation needed to be considered under paragraph (a). Although this difference was noted, it was not suggested that it affected the outcome (T67).

83 It is not necessary to set out the Commissioner’s submissions, which are largely accepted in the reasons that follow.

## Consideration

84 The issue is whether the appellants are entitled to “discount capital gains” under Subdiv 115-A of the ITAA 1997 in relation to the disposals of shares in Findex to Macquarie.

85 A threshold requirement for a “discount capital gain” is that the taxpayer must have acquired the asset giving rise to the capital gain at least 12 months before the CGT event: s 115-25. In the present case, each trust acquired the shares in Findex less than 12 months before the disposal. However, the appellants contend that the trustees of the trusts should be taken or deemed to have acquired the shares more than 12 months before the disposal.

86 Subdiv 115-A of the ITAA 1997 contains a number of special rules about the time of acquisition of an asset to address, among other things, the circumstance where the asset disposed of was acquired pursuant to a CGT roll-over. Relevantly:

(a) section 115-34(2) contains a special rule that applies where the asset disposed of was acquired pursuant to a replacement-asset roll-over under Subdiv 122-A, 122-B or 124-N; and

(b) item 2 in the table to s 115-30(1) contains a special rule that applies where the asset disposed of was acquired pursuant to any other type of replacement-asset roll-over (including, relevantly, a roll-over under Subdiv 124-M).

87 It will be convenient to focus on the transactions involving the S&TP Trust. (We refer to the other trusts later in these reasons.)

88 The asset disposed of by the S&TP Trust was the shares in Findex. The trust acquired the shares as a replacement asset for a replacement-asset roll-over under Subdiv 124-M. Accordingly, item 2 in the table to s 115-30(1) applies.

89 The roll-over was “the last in an unbroken series of replacement-asset roll-overs (other than roll-overs covered by paragraph 115-34(1)(c))”. The unbroken series of replacement-asset roll-overs consisted of:

(a) the Subdiv 124-M roll-over for the exchange by the S&TP Trust of all of its shares in STP Holdings for shares in E-Quest on 15 January 2008; and

(b) the Subdiv 124-M roll-over for the exchange by the S&TP Trust of all of its shares in E-Quest for shares in Findex on 15 January 2008.

90 Accordingly, paragraph (b) of the second column of item 2 applies and the S&TP Trust is taken to have acquired the shares in Findex on 14 January 2008 – when it acquired “the original asset involved in the first roll-over in the series” (i.e. the shares in STP Holdings). Prima facie, the S&TP Trust acquired the shares in STP Holdings on 14 January 2008, which was less than 12 months before the relevant transaction (the disposal of the shares in Findex).

91 The appellants’ principal contention is that s 115-34(2) operates so that the S&TP Trust is taken to have acquired the shares in STP Holdings at an earlier date for the purposes of paragraph (b) of the second column of item 2 in the table to s 115-30(1). This is on the basis that the shares in STP Holdings were acquired pursuant to a roll-over under Subdiv 124-N, such that s 115-34(2) applied when the S&TP Trust disposed of those shares.

92 There is no issue between the parties as to the applicable principles of statutory construction. These were set out by the primary judge by reference to s 15AA of the *Acts Interpretation Act 1901* (Cth); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]; *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378 (***Certain Lloyd’s Underwriters***) at [25]-[26]; and *SZTAL* at [14]: see the Reasons at [49]-[53].

93 In our view, ss 115-30 and 115-34, properly construed, cannot operate in combination in the way contended for by the appellants.

94 First, the deeming effect of s 115-34(2) does not extend to s 115-30(1). Section 115-34(2) provides that “[s]ections 115-25 and 115-40 apply as if you had \*acquired the \*share at least 12 months before the \*CGT event”. It does not refer to s 115-30. Thus, on a plain reading of s 115-34, the deeming effect does not extend to s 115-30.

95 Secondly, the proposition that either s 115-30 *or* s 115-34 – but not both – may apply to affect the time when an entity is treated as having acquired a CGT asset is supported by the second note under s 115-25, which states that “[s]ection 115-30 **or** 115-34 may affect the time when the entity is treated as having acquired the CGT asset” (emphasis added).

96 Thirdly, while s 115-34(2) may have operated when the S&TP Trust disposed of all of its shares in STP Holdings to E-Quest (to deem the S&TP Trust to have acquired the shares at least 12 months before that CGT event), the primary judge was correct to state that this was relevant only for the purposes of working out whether the capital gain on *that* disposal was a “discount capital gain”: Reasons, [40]. Because the taxpayer claimed roll-over relief in respect of that disposal (which it did not have to do), the capital gain was disregarded.

97 Fourthly, Subdiv 115-A does not expressly provide for the deeming effect of s 115-34(2) to be, in effect, carried over to a later disposal of shares (such as the disposal by the S&TP Trust of the shares in Findex).

98 Fifthly, the legislative history does not, in fact, advance the appellants’ submissions. In order to explain the reasons for and the nature of the 2010 Amendments, it is necessary first to set out some of the relevant provisions as they stood before those amendments, and then to describe the problems that were perceived to exist with those provisions.

99 Prior to the 2010 Amendments, s 115-30 was relevantly in the following terms:

**115-30 Special rules about time of acquisition**

*Entity is treated as acquiring some CGT assets early*

(1) Sections 115-25,115-40 and 115-45 (the ***affected sections***) apply as if an entity (the ***acquirer***) had acquired a \*CGT asset described in an item of the table at the time mentioned in the item:

|  |  |  |
| --- | --- | --- |
| **When the acquirer is treated as having acquired a CGT asset** | | |
| **Item** | **The affected sections apply as if the acquirer had acquired this CGT asset:** | **At this time:** |
| 1 | A \*CGT asset the acquirer \*acquired in circumstances giving rise to a \*same-asset roll-over | (a) when the entity that owned the CGT asset before the roll-over \*acquired it; or  (b) if the asset has been involved in an unbroken series of roll-overs — when the entity that owned it before the first roll-over in the series \*acquired it |
| 2 | A \*CGT asset that the acquirer \*acquired as a replacement asset for a \*replacement-asset roll-over | (a) when the acquirer acquired the original asset involved in the roll-over; or  (b) if the acquirer acquired the replacement asset for a roll-over that was the last in an unbroken series of replacement-asset roll-overs — when the acquirer acquired the original asset involved in the first roll-over in the series |
| … |  |  |

100 Section 115-45 was (and is) an integrity measure. Broadly, it was (and is) designed to deny a discount capital gain where a taxpayer disposes of a share in a company or an interest in a trust in circumstances where the taxpayer would not have been entitled to a discount capital gain on the majority of CGT assets underlying the share or interest. Prior to the 2010 Amendments, the section provided:

**115-45 Capital gain from equity in an entity with newly acquired assets**

*Purpose of this section*

(1) The purpose of this section is to deny you a \*discount capital gain on your \*share in a company or interest in a trust if you would *not* have had \*discount capital gains on the majority of \*CGT assets (by cost and by value) underlying the share or interest if:

(a) you had owned them for the time the company or trust did; and

(b) \*CGT events had happened to them when the CGT event happened to your share or interest.

*When a capital gain is not a discount capital gain*

(2) Your \*capital gain from a \*CGT event happening to:

(a) your \*share in a company; or

(b) your \*trust voting interest, unit or other fixed interest in a trust;

is *not* a ***discount capital gain*** if the 3 conditions in subsections (3), (4) and (5) are met. This section has effect despite section 115-5 and subsection 115-30(2).

Note: This section does not prevent a capital gain from being a discount capital gain if there are at least 300 members or beneficiaries of the company or trust and control of the company or trust is not and cannot be concentrated (see section 115-50).

*You had at least 10% of the equity in the entity before the event*

(3) The first condition is that, just before the \*CGT event, you and your \*associates beneficially owned:

(a) at least 10% by value of the \*shares in the company (except shares that carried a right only to participate in a distribution of profits or capital to a limited extent); or

(b) at least 10% of the \*trust voting interests, issued units or other fixed interests (as appropriate) in the trust.

*Cost bases of new assets are more than 50% of all cost bases of entity’s assets*

(4) The second condition is that the total of the \*cost bases of \*CGT assets that the company or trust owned at the time of the \*CGT event and had \*acquired *less* than 12 months before then is *more* than half of the total of the \*cost bases of the \*CGT assets the company or trust owned at the time of the event.

Note: Section 115-30 may affect the time when the company or trust is treated as having acquired a CGT asset.

*Net capital gain on entity’s new assets would be more than 50% of net capital gain on all the entity’s assets*

(5) The third condition is that the amount worked out under subsection (6) is *more* than half of the amount worked out under subsection (7).

(6) Work out the amount that would be the \*net capital gain of the company or trust for the income year if:

(a) just before the \*CGT event, the company or trust had \*disposed of all of the \*CGT assets that it owned then and had \*acquired less than 12 months before the \*CGT event; and

(b) it had received the \*market value of those assets for the disposal; and

(c) the company or trust did not have any \*capital gains or \*capital losses from \*CGT events other than the disposal; and

(d) the company or trust did not have a \*net capital loss for an earlier income year.

Note: Section 115-30 may affect the time when the company or trust is treated as having acquired a CGT asset.

(7) Work out the amount that would be the \*net capital gain of the company or trust for the income year if:

(a) just before the \*CGT event, the company or trust had \*disposed of all of the \*CGT assets that it owned then; and

(b) it had received the \*market value of those assets for the disposal; and

(c) all of the \*capital gains and \*capital losses from those assets were taken into account in working out the net capital gain, despite any rules providing that one or more of those capital gains or losses are not to be taken into account in working out the net capital gain; and

(d) the company or trust did not have any \*capital gains or \*capital losses from \*CGT events other than the disposal; and

(e) the company or trust did not have a \*net capital loss for an earlier income year.

101 The amendments made by the 2010 Amending Act were designed to address problems with the application of these provisions in cases where a taxpayer had entered into a replacement-asset roll-over within 12 months of the relevant CGT event. Sections 115-32 and 115-34 were introduced to address those problems. The problems are explained in the Explanatory Memorandum (at pp 209-211):

These amendments give effect to a suggestion made through TIES 0042-2009.

Section 115-30 provides for a different acquisition date for a CGT asset that its owner acquired because of a same asset, or replacement asset, roll-over.

**Sections 115-30 and 115-45 may operate in certain circumstances to deny taxpayers access to the CGT discount if they sell their replacement interests within 12 months of receiving a roll-over because the acquirer entity will not have owned the interests in the original entity for at least 12 months.**

The amendment allows a taxpayer who sells their interest in the acquirer entity to ‘look through’ to the assets of the original entity to establish whether the interests in the original entity, which are now owned by the acquirer entity, can be considered to have been owned for at least 12 months. *[Schedule 6, item 136, section 115-32]*

This means that the requirements in subsections 115-45(4) and (5) need to be applied to the shares or trust interests now owned by the acquirer entity to determine whether they have been owned for at least 12 months. These requirements will be satisfied if the cost bases and the net capital gain of assets of the original entity that have been owned for less than 12 months are not more than 50 per cent of the cost bases and net capital of all the original entity’s assets.

This result is then used to test whether the taxpayer is entitled to the discount under section 115-45 by applying subsections 115-45(4) and (5) to the acquirer entity’s assets.

The amendment does not apply to replacement assets acquired under the replacement asset roll-overs provided by Subdivisions 122-A, 122-B and 124-N. *[Schedule 6, items 135, 136, 139 to 145, section 115-32, subsections 115-45(4) and (6)]*

**Sections 115-30 and 115-45 may also deny taxpayers access to the CGT discount if they sell a company share received as a replacement asset under a Subdivision 122-A or 122-B replacement-asset roll-over (disposal of assets to a wholly-owned company) or a Subdivision 124-N replacement-asset roll-over (disposal of assets by a trust to a company) before they have owned the share for 12 months.** Also, as the company acquires its assets at the time of the roll-over, selling a share in the company before owning it for at least 12 months will mean the conditions in subsections 115-45(4) and (5) may be met as the company has held its assets for less than 12 months. This results in denying the taxpayer the CGT discount.

The amendment for these specific replacement-asset roll-overs treats the taxpayer’s replacement asset (share) for the purpose of the CGT discount as being owned for a period of at least 12 months where the share is sold within 12 months of its actual acquisition. The taxpayer therefore does not need to establish an acquisition date for the replacement asset under item 2 in the table in subsection 115-30(1), which is turned off for the purpose of new section 115-34. *[Schedule 6, item 142, section 115-34]*

Also, the amendment allows for the assets owned by the acquiring company to be taken to be owned from the time when the taxpayer originally acquired them for the purposes of subsections 115-45(4) and (6).

The amendments result in the taxpayer being able to sell their share within 12 months of acquisition and still receive the discount where not more than 50 per cent (by cost base and net capital gain) of the company’s assets have been owned for less than 12 months including the period they were owned by the taxpayer. *[Schedule 6 items 142 to 145, section 115-34, subsections 115-45(4) and (6)]*

The amendments apply to assessments for the income year including 21 September 1999 and for later income years, in relation to CGT events happening after 11.45 am (by legal time in the Australian Capital Territory) on that day. This makes the application of the amendments consistent with the general approach taken to the application of the CGT discount. However, standard amendment periods still apply. The retrospective application of these amendments does not have a negative affect [sic] on taxpayers. *[Schedule 6, item 146]*

(Bold emphasis added.)

102 The TIES document is consistent with the description of the first problem set out in the Explanatory Memorandum. The TIES document does not provide any additional useful information.

103 Section 115-32 (introduced by the 2010 Amending Act) provides as follows:

**115-32 Special rule about time of acquisition for certain replacement-asset roll-overs**

(1) This section applies if:

(a) a \*CGT event happens to:

(i) your \*share in a company; or

(ii) your \*trust voting interest, unit or other fixed interest in a trust; and

(b) you \*acquired the share or interest as a replacement asset for a \*replacement‑asset roll‑over (other than a roll‑over covered by paragraph 115‑34(1)(c)); and

(c) at the time of the CGT event, the company or trust:

(i) owns a \*membership interest in an entity (the ***original entity***); and

(ii) has owned that membership interest for less than 12 months; and

(d) that membership interest is the original asset for the roll‑over.

Note: This section does not affect the time when you are treated as having acquired the replacement asset. That time is worked out under item 2 of the table in subsection 115‑30(1).

*Application of tests about the assets of the company or trust*

(2) Subsection 115‑45(4) applies as if the company or trust had \*acquired the original asset at least 12 months before the \*CGT event, if the condition in that subsection would not be met were it to be applied to the original entity and the CGT event.

(3) Subsection 115‑45(6) applies as if the company or trust had \*acquired the original asset at least 12 months before the \*CGT event, if the condition in subsection 115‑45(5) would not be met were it to be applied to the original entity and the CGT event.

104 Section 115-34, also introduced by the 2010 Amending Act, has been set out at [14] above.

105 Section 115-30 was amended by the 2010 Amending Act. The words underlined in [10] above were inserted.

106 It is not necessary for present purposes to set out the amendments made to s 115-45.

107 While both ss 115-32 and 115-34 are concerned with avoiding the operation of s 115-45 to deny a discount capital gain after a replacement-asset roll-over, they each operate differently. Broadly:

(a) Section 115-32 (which does not apply to roll-overs under Subdiv 122-A, 122-B or 124-N) does not deem the taxpayer to have acquired the replacement asset at a different time. Item 2 in the table to s 115-30(1) is left to do the work of determining the time of acquisition of the replacement asset. If the original asset was not acquired more than 12 months ago, the capital gain will not be a discount capital gain because s 115-25(1) will not be satisfied and there will be no need to consider s 115-45. If the original asset was acquired more than 12 months ago, it will be necessary to consider s 115-45. Sections 115-45(4) and (6) are, in effect, applied to the original entity – that is, one ‘looks through’ the interposed entity.

(b) Section 115-34 (which only applies to roll-overs under Subdivisions 122-A, 122-B and 124-N) *does* deem the taxpayer to have acquired the replacement asset at a different time – namely, “at least 12 months before the CGT event”. Moreover, item 2 in the table to s 115-30(1) was amended so that it did not apply to such roll-overs. Even if the original assets were acquired less than 12 months ago, s 115-25(1) will be satisfied. It will then be necessary to consider s 115-45. Special rules then apply for the purposes of ss 115-45(4) and (6).

108 Item 2 in the table to s 115-30(1) accommodates the collapse of multiple replacement-asset roll-overs, provided they occur in an unbroken series. However, as amended in 2010, it does not extend to roll-overs under Subdivision 122-A, 122-B or 124-N. It may be inferred that, in making the amendments described above, the legislature did not intend that the special acquisition rules applying to replacement-asset roll-overs under Subdivision 122-A, 122-B or 124-N could be combined with those applying to other kinds of replacement-asset roll-overs.

109 The appellants submit that, based on the legislation as it stood in 2008 (before the amendments), the appellants would have been entitled to discount capital gains. The appellants submit that the amendments were designed to overcome the problems described above, and not to affect the position of taxpayers in the position of the appellants. We do not accept this approach to ascertaining the legislative intention. The legislative history indicates that the relevant provisions were introduced or amended in order to address the two problems described in the Explanatory Memorandum. Those problems were addressed by the introduction of ss 115-32 and 115-34 and the related amendment of other provisions. The resulting provisions are complex and detailed. Given the nature of the provisions, we do not consider it possible to say that the legislature intended discount capital gains to continue to be available in the types of situations covered by the present case (even assuming that discount capital gains would have been available under the provisions as they stood in 2008, before the amendments). Further, there is no indication in the Explanatory Memorandum or other legislative materials that ss 115-30 and 115-34 were intended to have a combined operation as contended for by the appellants.

110 For these reasons, we reject the appellants’ principal contention, which is based on the combined operation of ss 115-30 and 115-34. The primary judge was correct to reject this contention, as advanced at first instance.

111 The appellants’ first alternative contention involves applying paragraph (a) of item 2 in the table to s 115-30(1) to each replacement-asset roll-over. Thus, for example, in relation to the S&TP Trust, paragraph (a) of item 2 would be applied to each of:

(a) the replacement-asset roll-over under Subdiv 124-N by which the trust’s ownership of the units in the Lifeplan Unit Trust ended and was replaced by shares in STP Holdings;

(b) the replacement-asset roll-over under Subdiv 124-M by which the trust exchanged all of its shares in STP Holdings for newly issued shares in E-Quest; and

(c) the replacement-asset roll-over under Subdiv 124-M by which the trust exchanged all of its shares in E-Quest for shares in Findex.

112 The difficulty with this approach is that paragraph (b) is specifically directed to a situation where there is “an unbroken series of replacement-asset roll-overs (other than roll-overs covered by paragraph 115-34(1)(c)”. It is unlikely that paragraph (a) was intended to operate in the very situation described in paragraph (b). For these reasons, we reject the appellants’ first alternative contention. The primary judge was correct to reject this contention.

113 The appellants’ second alternative contention is that a reference to s 115-30 should be read into s 115-34(2) in accordance with the principles set out in *Cooper Brookes* and *Taylor*.

114 In *Taylor,* French CJ, Crennan and Bell JJ said at [37]-[40]:

37 Consistently with this Court’s rejection of the adoption of rigid rules in statutory construction, it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. As the review of the authorities in *Leys* [*Director of Public Prosecutions v Leys* (2012) 296 ALR 96] demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect. And as their Honours observed by reference to the legislation considered in *Carr v Western Australia*, the question of whether a construction “reads up” a provision, giving it an extended operation, or “reads down” a provision, confining its operation, may be moot.

38 The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills “gaps disclosed in legislation” or makes an insertion which is “too big, or too much at variance with the language in fact used by the legislature”.

39 Lord Diplock’s three conditions (as reformulated in *Inco Europe Ltd v First Choice Distribution*) accord with the statements of principle in *Cooper Brookes* … However, it is unnecessary to decide whether Lord Diplock’s three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that “the modified construction is reasonably open having regard to the statutory scheme” because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour’s further observation, “[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances”.

40 Lord Diplock’s speech in *Wentworth Securities* laid emphasis on the task as construction and not judicial legislation. In *Inco Europe* Lord Nicholls of Birkenhead observed that even when Lord Diplock’s conditions are met, the court may be inhibited from interpreting a provision in accordance with what it is satisfied was the underlying intention of Parliament: the alteration to the language of the provision in such a case may be “too far-reaching”. In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the *Constitution*.

(Footnotes omitted.)

115 In the same case, Gageler and Keane JJ stated at [65]-[66]:

65 Statutory construction involves attribution of legal meaning to statutory text, read in context. “Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning … But not always”. Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.

66 Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies.

(Footnotes omitted.)

Although Gageler and Keane JJ were in dissent in *Taylor*, that does not appear to affect their Honours’ statement of the relevant principles in the above passage. We note that their Honours’ judgment at [65] was cited in *HFM043* at [24] by Kiefel CJ, Gageler and Nettle JJ.

116 Applying these principles, we are not persuaded that it is necessary, in order for the provisions to achieve their purpose, to read into s 115-34(2) a reference to s 115-30 so as to give the provisions a combined operation as contended for by the appellants. The legislative materials do not demonstrate or indicate that the provisions were intended to operate in this way.

117 Neither the first nor the second of Lord Diplock’s conditions (as reformulated in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592) is satisfied in the present case. In relation to the first condition (namely identification of the precise purpose of the provision), it is not possible to identify from the terms of the provisions or the legislative materials an intention that the provisions operate in a combined way. In relation to the second condition (namely, satisfaction that the drafter and Parliament inadvertently overlooked an eventuality that must be dealt with if the provision is to achieve its purpose), it is not demonstrated that the drafter and Parliament inadvertently overlooked such an eventuality.

118 For these reasons, we reject the appellants’ second alternative contention. The primary judge was correct to reject this contention.

119 It follows that, in the case of the S&TP Trust, the trust is taken to have acquired the shares in Findex on 14 January, when it acquired the shares in STP Holdings: paragraph (b) of item 2 in the table to s 115-30(1). The steps in the application of this provision are set out in [88]-[90] above.

120 The same analysis applies to the transactions involving the Grosvenor Trust. In that case, as in the case of the S&TP Trust, there was “an unbroken series of replacement-asset roll-overs (other than roll-overs covered by paragraph 115-34(1)(c))”, namely the two Subdiv 124-M roll-overs. The fact that the other roll-over was under Subdiv 122-A rather than Subdiv 124-N (both of which are covered by s 115-34(1)(c)) does not affect the analysis.

121 The analysis is not precisely the same in relation to the STP Trust and the SP Trust. In summary, the relevant paragraph in item 2 in the table to s 115-30(1) is paragraph (a) rather than paragraph (b). However, this does not affect the outcome. The steps in the application of the provisions to these trusts are as follows. In each case, the asset disposed of by the trust was the shares in Findex. The trust acquired the shares as a replacement asset for a replacement-asset roll-over under Subdiv 124-M (being a type of roll-over that is not covered by s 115-34(1)(c)). Accordingly, item 2 in the table to s 115-30(1) applies. Unlike the other cases, paragraph (b) of item 2 is inapplicable. That is because paragraph (b) refers to a situation where the acquirer (the trust) acquired the replacement asset for a roll-over that was the last in “an unbroken series of replacement-asset roll-overs (other than roll-overs covered by paragraph 115-34(1)(c))”. In these cases, once the roll-over under Subdiv 124-N is excluded (this being a type of roll-over referred to in s 115-34(1)(c)), there is only one roll-over remaining, namely a Subdiv 124-M roll-over. Paragraph (a) of item 2 *is* applicable to these cases. That paragraph provides that the trust is taken to have acquired the CGT asset (the shares in Findex) “when the acquirer [the trust] acquired the original asset involved in the roll-over”. The original asset involved in the Subdiv 124-M roll-over (this being the roll-over referred to in the first column of item 2) was, in each case, the shares in E-Quest. In each case, the shares in E-Quest were acquired on 15 January 2008.

122 It follows that, in all cases, the relevant threshold requirement for a “discount capital gain”, namely that the taxpayer must have acquired the asset giving rise to the capital gain (the shares in Findex) at least 12 months before the CGT event, is not satisfied. Accordingly, the appellants are not entitled to “discount capital gains” under Subdiv 115-A of the ITAA 1997.

123 As noted above, the primary judge observed at [6]-[7] of the Reasons that the outcome was in some ways an unpalatable result and that it seemed to be at odds with the underlying policy of the legislation. Given the detail and complexity of the provisions, it is difficult to assess whether the result is contrary to the underlying policy of the provisions. Nevertheless, it is fair to say that the technical requirements of the provisions are such that there may be practical outcomes that appear to be inconsistent or hard to reconcile.

## Conclusion

124 For the reasons set out above, each of the appeals is to be dismissed.

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| I certify that the preceding one hundred and twenty-four (124) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kenny, Kerr and Moshinsky. |

Associate:

Dated: 18 October 2019